A

AHMAD FAIZAL ALI AULAD ALI & ORS

v.

PP

B

HIGH COURT MALAYA, SHAH ALAM
YEOH WEE SIAM JC
[CRIMINAL APPEAL NO: 42-110-2007]
28 JULY 2009

C

CRIMINAL LAW: *Penal Code - Section 376 - Rape - Conviction and sentence - Appeal against - Prima facie case - Whether established - Whether victim's evidence credible and corroborated - Inconsistencies in victim's evidence - Whether material to substantive issues - Whether medical evidence sufficient to support rape allegation - Whether there was*

D

cogent evidence to prove SP4 an accomplice or accessory after the fact - Whether unsworn statements from the dock of the appellants carried much weight - Whether defence raised any reasonable doubt on prosecution's case

CRIMINAL LAW: *Penal Code - Section 377C - Carnal intercourse against the order of nature without consent - Conviction and sentence -*

E

Appeal against - Prima facie case - Whether established - Whether victim's evidence credible and corroborated - Inconsistencies in victim's evidence - Whether material to substantive issues - Whether medical evidence sufficient to support rape allegation - Whether there was cogent

F

evidence to prove SP4 an accomplice or accessory after the fact - Whether unsworn statements from the dock of the appellants carried much weight - Whether defence raised any reasonable doubt on prosecution's case

EVIDENCE: *Witness - Whether witness an accomplice or accessory after the fact - Whether there was evidence to prove SP4 committed*

G

offences or abetted in the committing of such offences - Rape - Carnal intercourse against the order of nature without consent

CRIMINAL PROCEDURE: *Sentence - Appeal against - Appellants' sentenced to 12 years imprisonment for offences of rape and carnal*

H

intercourse against the order of nature without consent - Whether sentence commensurated with offences committed - Whether manifestly excessive warranting court intervention - Whether such repulsive offences should be punished in a deterrent manner

I

The first appellant and the second appellant were charged for an offence committed under s. 377C Penal Code while the third appellant was charged under s. 376 of the same. At the close of the prosecution's case, the trial judge held that a *prima facie* case

had been established against the three appellants on their respective charges. Accordingly, the trial judge called the three appellants to enter their defence. The three appellants opted to give unsworn statements from the dock for their defence. The trial judge held that the defence had not raised any reasonable doubt on the prosecution's case and found the three appellants guilty as charged and convicted them. Each of the three appellants were sentenced to 12 years imprisonment. The three appellants appealed against the conviction and sentence. The issues in the appeal were (i) whether the trial judge had erred in fact and law for finding that the prosecution had established a *prima facie* case; (ii) whether the trial judge had erred in fact and law for holding that the defence had not raised any reasonable doubt on the prosecution's case and for finding the three appellants guilty and convicting them on their respective charges; (iii) whether the evidence of the victim/complainant (SP2) was credible and corroborated; (iv) whether SP4 was an accomplice or an accessory after the fact; (v) whether the unsworn statements from the dock of the three appellants carried much weight.

Held (maintaining conviction of the appellants):

(1) In regards to the offence of rape allegedly committed by the third appellant under s. 376 of the Penal Code, from the evidence of SP2, it showed that there was sexual intercourse between the third appellant and SP2 and there was penetration by the third appellant's male organ into SP2's private part. The trial judge was correct to conclude that the sexual intercourse was against SP2's will and without SP2's consent due to SP2's testimony that the third appellant had pulled SP2 by her clothes to the bed and had pinned her down while two other male persons pulled off SP2's pants. Under those circumstances, SP2 was unable to resist the third appellant. It was also not disputed that the third appellant and SP2 were not husband and wife at the time of the sexual intercourse. They were total strangers to each other, considering that they had never met before the incident. As for the charge under s. 377C of the Penal Code against the three appellants, it was proven that the first, second and third appellants had committed carnal intercourse against the order of nature and that such act was committed without the consent or against the will of the victim. There was no

A evidence to show that SP2 had willingly sucked the appellants' male organs. As for the identity of the three appellants, the trial judge did not err in her findings as SP2 was able to positively identify the appellants. As for supporting evidence, the trial judge relied on the police report lodged by SP2 a few B hours after the incident and on the evidence given by the medical doctor (SP3) who examined SP2 and found that there were several tears in SP2's hymen in her vagina. According to SP3, the tears happened in less than 24 hours and such tears happened as a result of the penetration of a blunt and hard C object such as a male organ. The evidence of SP3 was not challenged by the defence. It could be safely concluded that SP2 was raped, based on the findings of SP3. Based on the above, the trial judge did not err in fact or in law in holding that a *prima facie* case had been established by the D prosecution against each of the three appellants on their respective charges. (paras 35, 39, 42, 44, 45, 48, 49, 53, 59, 60, 61 & 64)

(2) The trial judge held that since the three appellants gave E unsworn evidence from the dock, and they could not be cross examined, she found it difficult to give value to the evidence, and she gave very little weight to such evidence. The trial judge was of the opinion that the unsworn evidence of the appellants was a mere denial and therefore the three appellants F had failed to raise any reasonable doubt on the prosecution's case. From a maximum evaluation of the totality of the evidence, the trial judge had not misdirected herself or had erred in fact and in law regarding her decision on the respective cases against the three appellants. (paras 67, 68, 69 G & 70)

(3) The inconsistencies in SP2's evidence were not material to the substantive issues regarding the charges or prove that SP2 was not a credible witness. SP2 was a victim of gang rape and H it would be impossible to get eye witnesses to come forward to corroborate her evidence. Be that as it may, SP3's medical evidence confirmed evidence of rape on SP2. This was sufficient to support SP2's evidence. (paras 75, 76 & 77)

(4) There was no cogent evidence on record to prove that SP4 I was an accomplice to the three appellants or an accessory after the fact. The evidence showed that SP4 had walked into the room where SP2 was and demanded the third appellant

to stop what he was doing and subsequently brought SP2 to the police station. There was no evidence to prove that SP4 was committing the same offences as the three appellants or abetting them in the committing of such offences. There was no evidence on any role of SP4 as an accomplice or accessory after the fact. Therefore, SP4 was a competent witness and his evidence could be accepted to support SP2's evidence. (para 85)

(5) The failure of the prosecution to produce more evidence of DNA testing on more relevant specimens did not mean that the evidence of the prosecution witnesses, in particular SP2, SP4 and SP3 should be rejected by the court. There is still no law to require that rape cases can only be proved by DNA tests and reports. As such, for the purpose of this case court accepted the existing evidence adduced by the prosecution. (para 92)

(6) The conviction of the three appellants by the trial judge on their respective charges was confirmed and maintained. Regarding the sentence imposed by the trial judge on each of the three appellants, such sentence was fair and appropriate, and commensurated with the offence committed. It was not manifestly excessive that it warranted an intervention by this court. (paras 105 & 106)

(7) The three appellants preyed upon a young innocent girl, who followed the second appellant to the house based on trust and friendship, and abused her body for their own selfish gratification, without regard to morality or conscience, or the fear of God. Such repulsive crimes should be punished in the most deterrent manner to prevent future cases of random gang rape and sexual abuse upon the young girls of our society. (para 106)

[The appellants applied for stay of execution of the sentence pending an appeal to be made to the Court of Appeal. A stay of execution of the sentence pending the outcome of the appeal was granted.]

Case(s) referred to:

Masroni Ahmad Rafi v. PP [1996] 1 LNS 341 HC ***(refd)***
Muhammad Salleh v. PP [1969] 1 MLJ 106 ***(refd)***
PP v. Ayyavoo Subramaniam & Anor [2004] 1 LNS 141 HC ***(refd)***
PP v. Mohd Abbas Danus Baksan [2004] 7 CLJ 249 ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(refd)***
PP v. Shariff Kadir [1997] 5 CLJ 463 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(ha)
Penal Code, ss. 109, 376, 377C

For the appellants - Wan Razali Wan Kadir; M/s Zaman Teng & Chan
For the respondent - Isa Hj Hassim DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Yeoh Wee Siam JC:

[1] This Criminal Appeal is in respect of the decision made by the learned Sessions Court judge, Petaling Jaya ("the trial judge") regarding Sessions Court Petaling Jaya Arrest Cases Nos. 62-80-2004, 62-81-2004, 62-82-2004, 62-83-2004 and 62-84-2004 ("the cases").

[2] The Criminal Appeal was heard on 24 July 2009 after which I delivered my oral judgment briefly. The following is the full text of my judgment:

[3] Ahmad Faizal Ali Aulad Ali, the first accused ("the first appellant") was charged with two charges as follows:

62-80-2004

Pertuduhan Pertama

> Bahawa kamu pada 4.5.2004 di antara jam lebih kurang 11.30 malam hingga 5.5.2004 jam lebih kurang 3.00 pagi bertempat di rumah No. 45, Jalan 3/4, Bandar Bukit Puchong, dalam Daerah Petaling, di dalam Negeri Selangor telah bersubahat dengan Fazrul Afizi Bin Abu Hasan, Nombor Kad Pengenalan: 841221-14-6043 dengan cara memegang tangan sebelah kiri seorang perempuan bernama Nur Sa'adah Binti Rahmat, nombor Kad Pengenalan: 841117-14-6334, berumur 19 tahun 5 bulan di mana kesalahan tersebut telah dilakukan atas sebab-sebab persubahatan kamu dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 376 Kanun Keseksaan dibaca bersama Seksyen 109 Kanun yang sama.

62-81-2004

Pertuduhan Kedua

Bahawa kamu pada 4.5.2004 di antara jam lebih kurang 11.30 malam hingga 5.5.2004 jam lebih kurang 3.00 pagi bertempat di rumah No. 45, Jalan 3/4, Bandar Bukit Puchong, dalam Daerah Petaling, di dalam Negeri Selangor telah mengadakan hubungan seks luar tabii dengan cara memaksa seorang perempuan bernama Nur Sa'adah Binti Rahmat, nombor Kad Pengenalan: 841117-14-6334, berumur 19 tahun 5 bulan menghisap kemaluan tanpa izin beliau dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 377C Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama.

Mohamad Afifi b. Arifin, the second accused ("the second appellant") was charged with one charge as follows:

62-82-2004

Bahawa kamu pada 4.5.2004 di antara jam lebih kurang 11.30 malam hingga 5.5.2004 jam lebih kurang 3.00 pagi bertempat di rumah No. 45, Jalan 3/4, Bandar Bukit Puchong, dalam Daerah Petaling, di dalam Negeri Selangor telah mengadakan hubungan seks luar tabii dengan cara memaksa seorang perempuan bernama Nur Sa'adah Binti Rahmat, nombor Kad Pengenalan: 841117-14-6334, berumur 19 tahun 5 bulan menghisap kemaluan tanpa izin beliau dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 377C Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama.

[4] Fazrul Afizi Abu Hassan, the third accused ("the third appellant") was charged with two charges as follows:

62-83-2004

Pertuduhan Pertama

Bahawa kamu pada 4.5.2004 di antara jam lebih kurang 11.30 malam hingga 5.5.2004 jam lebih kurang 3.00 pagi bertempat di rumah No. 45, Jalan 3/4, Bandar Baru Puchong, dalam Daerah Petaling, di dalam Negeri Selangor telah merogol seorang perempuan bernama Nur Sa'adah Binti Rahmat, nombor Kad Pengenalan 841117-14-6334, berumur 19 tahun 5 bulan, oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 376 Kanun Keseksaan.

62-84-2004

Pertuduhan Kedua

Bahawa kamu pada 4.5.2004 di antara jam lebih kurang 11.30 malam hingga 5.5.2004 jam lebih kurang 3.00 pagi bertempat di rumah No. 45, Jalan 3/4, Bandar Bukit Puchong, dalam Daerah Petaling, di dalam Negeri Selangor telah mengadakan hubungan seks luar tabii dengan cara memaksa seorang perempuan bernama Nur Sa'adah Binti Rahmat, nombor Kad Pengenalan: 841117-14-6334, berumur 19 tahun 5 bulan menghisap kemaluan tanpa izin beliau dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 377C Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama.

[5] The first appellant, second appellant and third appellant ("the three appellants") had claimed trial to the charges and were jointly tried without any objections from the defence since the offences involved the same victim in the same transaction.

[6] At the close of the prosecution's case, the trial judge held that a *prima facie* case had been established against the three appellants on their respective charges. Accordingly, the trial judge called the three appellants to enter their defence.

[7] The three appellants opted to give unsworn statements from the dock for their defence.

[8] At the close of the case for the defence, the trial judge held that the defence had not raised any reasonable doubt on the prosecution's case. She therefore found the three appellants guilty as charged and convicted them. After hearing the plea in mitigation the trial judge sentenced each of the three appellants to 12 years imprisonment with effect from the date of sentence ie, 29 October 2007 (see charge sheets in Appeal Record pp. 7, 9, 11, 13 and 15). The trial judge did not impose any punishment of whipping in view of the young age of the three appellants.

[9] Upon the application of counsel for the defence, the trial judge granted stay of execution of the sentence pending the appeal.

[10] At the time of the commission of the offence, the first appellant was 18 years old (now 23), the second appellant was 21 years old (now 26), the third appellant was 20 years old (now 25), and the victim, Nur Sa'adah binti Rahmat ("SP2") was 19 years 5 months old (now 24).

[11] The three appellants are now appealing against the whole decision of the trial judge ie, against the conviction and sentence (see Notice of Appeal in pp. 1 and 2 and Petition of Appeal in pp. 3 to 6 of the Appeal Record). A

[12] The main issues, *inter alia*, as found in the Petition of Appeal can be summarised as follows: B

(1) the trial judge had erred in fact and law for finding that the prosecution had established a *prima facie* case and for calling for the three appellants to enter their defence; C

(2) the trial judge had erred in fact and law for holding that the defence had not raised any reasonable doubt on the prosecution's case and for finding the three appellants guilty and convicting them on their respective charges. D

[13] In pp. 547, 548 and 552 of the Appeal Record, the trial judge, in her grounds of judgment, admitted that she had erred in finding that the prosecution had succeeded in proving a *prima facie* case against the first appellant in respect of the offence in the first charge under section s. 376, read together with s. 109, of the Penal Code ie, for abetment of rape. This is because, after scrutinizing the evidence of SP2, the trial judge found that there was no evidence to show that the first appellant was holding the left hand of SP2 to enable the third appellant to rape SP2. For that reason, the trial judge stated that the prosecution had failed to prove any abetment by the first appellant. E F

[14] The trial judge admitted that she therefore had made a mistake in calling for the first appellant to enter his defence on his first charge. The trial judge stated that she should have, instead, acquitted and discharged the first accused at that stage. G

[15] In view of the clear admission of the trial judge regarding the above error, I then set aside the order and sentence of the trial judge in respect of Case No. 62-80-2004. The first appellant was acquitted and discharged on the first charge under s. 376, read together with s. 109, of the Penal code. H

[16] The background facts of the cases as laid down by the trial judge are as follows (see Appeal Record pp. 536 to 541): I

[17] The victim/complainant in this case, Nur Sa'adah binti Rahmat (SP2), was a University student aged 19 years 5 months. On 4 May 2004, SP2 was having her semester holidays and working part-time at a supermarket ie, The Store, at Shah Alam.

[18] SP2 befriended a male person known as "Amy" three months before that. SP2 came to know Amy through the sms and telephone calls. However, SP2 had not met Amy yet.

[19] On 4 May 2004, a male person named Amy invited SP2 to meet him. SP2 agreed to do so after her work.

[20] After her work at 10.30pm that same day, SP2 went to the bus stop near the supermarket, The Store, at Shah Alam. There, SP2 met a male person known as Amy. That male person has been identified by SP2 as the second appellant.

[21] The second appellant invited SP2 to go walking around and going places with him ("berjalan-jalan"). SP2 agreed and rode pillion on the second appellant's motorcycle.

[22] According to SP2, the second appellant brought SP2 to Puchong where they stopped at a restaurant. The second appellant's hand phone rang several times and SP2 was told by the second appellant that his mother told him to go back quickly and that his mother wanted to meet SP2.

[23] At first SP2 did not want to follow the second appellant back to meet his mother. After some persuasion and affection shown by the second appellant, SP2 agreed to follow him.

[24] When they reached a two storey terrace house, which apparently was the second appellant's house, the second appellant asked SP2 to go into the house. SP2 did not want to do so. SP2 waited for the second appellant's mother to come out of the house but the mother did not come out.

[25] After that, SP2 saw 4 – 5 motorcycles heading towards and coming into the compound of the house. Then a male person, who was wearing a striped shirt, forcefully pulled SP2's towards the house. After that, five male persons, who were riding their motorcycles before this, surrounded SP2. SP2 did not feel good about it and was beginning to feel frightened.

[26] After that, the male persons pulled SP2 into the house and they entered the living room. There, SP2 saw 5 – 6 more male persons who were sitting down and chit-chatting. At that time, the second appellant was next to SP2 and the first appellant was behind SP2. The second appellant went upstairs to call his mother several times. After that, SP2 was pulled upstairs whilst the first appellant was pushing SP2 from behind.

[27] Then the second appellant told SP2 to enter a room on the left. The light in the room was switched on and SP2 could see a Queen size bed. The first appellant entered the room and switched off the light.

[28] After that, the first appellant pushed SP2 onto the bed and invited SP2 to play ("main"). The first appellant pressed down upon SP2 who was then lying weakly on the bed. SP2 screamed and tried to push the first appellant's body away but the first appellant pressed SP2's hand until SP2 felt pain and started to cry and scream "Tak nak, tak nak". After that, the first appellant tried to strangle SP2's neck, and closed SP2's mouth and nose until SP2 could not breathe. Then the first appellant touched and groped SP2's body, kissed her mouth and unbuttoned her clothes. After that, the first appellant pulled off SP2's pants and inserted his male organ into SP2's private part. The first appellant sat on SP2's body and moved towards SP2's face and forced SP2 to lick his male organ. SP2 was not sure whether the first appellant's seminal fluid came out but SP2 felt a salty taste in her mouth.

[29] After that, the first appellant went out of the room. The second appellant then came in. SP2 was angry with the second appellant and asked him to release her. The second appellant said that he could help SP2 on condition that SP2 sucked his male organ. SP2 did not agree. However, the second appellant took off his trousers a little and took out his male organ. The second appellant pulled SP2 and asked her to suck his male organ. The second appellant's male organ was shoved into SP2's mouth 3 – 4 times, and pushed and pulled in and out. According to SP2, the second appellant's male organ was erect. SP2 was not sure whether the second appellant let out his seminal fluid. SP2 vomited out her saliva and it got onto the second appellant's trousers, and the second appellant scolded SP2. After that, the second appellant left the room through the bathroom door.

[30] SP2 saw that several male persons had crowded together at the bathroom door, and were looking at everything. Later the male persons entered the room and asked SP2 how she came there. After that, a male person, whom SP2 identified as the third appellant, came and rubbed slowly SP2's body. SP2 got scared and screamed. The male persons who had earlier entered the room then left the room leaving only the third appellant and two other male persons. The third appellant pulled SP2 to the bed and threw her down onto it. After that, the two male persons pulled

A off SP2's pants. The third appellant told the two male persons to leave the room. Then the third appellant unzipped his trousers, took out his male organ and told SP2 to suck it. After that, the third appellant went on top of SP2's body and inserted his male organ into SP2's private part for about 5 – 10 minutes.

B

[31] After that, about 12 male persons entered the room. SP2 was raped, sodomised and forced to suck the male organs of these male persons, who were not known to SP2. The first appellant inserted his finger into SP2's private part. Later, the
C third appellant inserted his male organ once again into SP2's private part; this time, it was for a longer period. The third appellant also inserted his male organ into SP2's anus.

[32] Later, a male person ("SP4") came and asked the third
D appellant to stop what he was doing. The male person (SP4) told SP2 to wear her clothes and then he brought her to the room downstairs. The first appellant directed SP2 to bathe. After bathing, SP2 was told to cook 20 packets of Maggi mee for the male persons who were in that house.

E **[33]** When it was all finished, the male person who tried to help SP2 (SP4) sent SP2 to the Puchong Police Station. SP2 lodged a Police report (exh. P2) and was later sent to hospital for a doctor's examination.

F **[34]** Based on the evidence of SP2 and the male person who helped SP2 (SP4), a few male persons were arrested including the three appellants, who were subsequently charged in the Sessions Court in Petaling Jaya.

G **Whether The Prosecution Has Established A *prima facie* case**

[35] The trial judge dealt first with the offence of rape allegedly committed by the third appellant under s. 376 of the Penal Code. The trial judge correctly summed up the ingredients required to be proved for the offence as follows (see Appeal Record p. 541):

H

(i) the third appellant had sexual intercourse with the victim, SP2.

(ii) such sexual intercourse occurred under 1 of the following circumstances provided under s. 377C of the Penal Code:

I

(a) against SP2's will;

(b) without SP2's consent;

(iii) there was penetration;

(iv) the third appellant and SP2 were not husband and wife.

First And Third Ingredients

[36] The trial judge held that the first and third ingredients were proved based on SP2's testimony as follows:

[37] The third appellant entered the room with several male persons through the bathroom door. After those male persons had gone out of the room, the third appellant pulled and forced SP2 down onto the bed. Two other male persons from the group that was there earlier pulled off SP2's pants, after which they were told to leave the room by the third appellant. The third appellant then lay on top of SP2's body and unzipped his trousers, took out his male organ, opened SP2's thighs and legs and inserted his male organ into SP2's private part for about 5 – 10 minutes. According to SP2, at that time there was light coming from the lamp outside and this enabled SP2 to see the third appellant's male organ which was in an erect state. SP2 also felt pain when the third appellant penetrated SP2 with his male organ. From this evidence given by SP2, it shows that there was sexual intercourse between the third appellant and SP2 and there was penetration by the third appellant's male organ into SP2's private part.

[38] I fully agree with the trial judge's findings that the first and third ingredients above have been proved by the prosecution.

Second ingredient

[39] The trial judge was correct to conclude that the sexual intercourse was against SP2's will and without SP2's consent for the following reasons:

(a) SP2 did not know the third appellant at all;

(b) before the third appellant raped SP2, SP2 was raped by the first appellant. The first and second appellants had forced SP2 to suck their male organs;

(c) SP2 was not able to fight the third appellant under those circumstances and there was no one who was prepared to help her;

(d) there were several male persons who entered the room where SP2 was and they sat around SP2 and this made SP2 very frightened and she screamed loudly;

(e) the third appellant pulled SP2 by her clothes to the bed and pinned SP2 down to the bed and two other male persons pulled off SP2's pants. Under those circumstances, SP2 was unable to resist the third appellant.

[40] The above clearly prove that the sexual intercourse that took place between the third appellant and SP2 was definitely against SP2's will and without her consent. Therefore, the second ingredient of the offence was also proved by the prosecution.

Fourth Ingredient

[41] The trial judge again correctly concluded that the fourth ingredient of the offence was proved since it cannot be disputed that the third appellant and SP2 were not husband and wife at the time of the sexual intercourse. I note that they were both total strangers to each other, considering that they had never met before the incident.

[42] As for the charge under s. 377C of the Penal Code against the three appellants, the trial judge again correctly summed up the following ingredients which have to be proved by the prosecution:

(i) the first, second and third appellants committed carnal intercourse against the order of nature;

(ii) such act was committed without the consent or against the will of the victim.

[43] The trial judge correctly concluded that ingredients (i) and (ii) above have been proved by the prosecution as follows:

[44] In respect of the first appellant, there was no evidence to show that SP2 willingly sucked the first appellant's male organ. SP2 did not know the first appellant at all. In a situation where the first appellant was on top of SP2's body, SP2 had no choice but to follow the first appellant's instructions.

[45] Therefore, both ingredients of the offence under s. 377C of the Penal Code were successfully proved by the prosecution against the first appellant in order to establish a *prima facie* case.

[46] In respect of the second appellant, the trial judge also correctly concluded that ingredients (i) and (ii) above have been proved by the Prosecution as follows: A

[47] According to SP2, after the first appellant left the room, the second appellant entered the room. At that time SP2 was sitting on the bed. The second appellant opened his trousers a little and took out his "anu" or male organ. The second appellant then held SP2's neck and pulled SP2 to suck his male organ. SP2 confirmed that the second appellant inserted his male organ 3 – 4 times into her mouth by pushing it in and out. SP2 could also see the second appellant's male organ, which was erect, through the light which came from outside. The act committed by the second appellant is clearly carnal intercourse against the order of nature. B C

[48] There was no evidence to show that SP2 willingly sucked the second appellant's male organ. SP2 had only just met the second appellant after knowing him through the phone for three months. SP2 did ask the second appellant to release her but the second appellant agreed to do so on condition that SP2 sucked his male organ first. However, SP2 did not agree. SP2 had just been raped by the first appellant and was forced to suck the first appellant's male organ. In view of that, SP2 was in a state of trauma and extreme stress. It is not probable that SP2 willingly did whatever she did. D E

[49] From the above, I agree with the trial judge that both ingredients of the offence under s. 377C of the Penal Code had also been proved by the Prosecution against the second appellant in order to establish a *prima facie* case. F

[50] In respect of the third appellant, the trial judge correctly concluded that ingredients (i) and (ii) above have been proved by the prosecution as follows: G

[51] According to SP2, before the third appellant raped her, the third appellant was on top of SP2's body. The third appellant pushed SP2's head and forced SP2 to suck his male organ twice. From SP2's evidence, it is clear that the third appellant committed carnal intercourse against the order of nature. H

[52] There is also no evidence to show that SP2 was willingly sucking the third appellant's male organ. SP2 did not know the third appellant at all. With the third appellant being on top of SP2's body, SP2 had no choice but to follow the third appellant's order. I

[53] Here again, from the above, I agree with the trial judge that both ingredients of the offence under s. 377C of the Penal Code have been proved by the prosecution against the third appellant in order to establish a *prima facie* case.

[54] As for the identity of the three appellants, I find that the trial judge did not err in her findings as follows:

[55] SP2 could positively identify the second appellant, who was the person who met SP2 at the bus stop near The Store, Shah Alam. SP2 also rode pillion on the second appellant's motorcycle to the house. SP2 and the second appellant did stop for a while at a restaurant. SP2 definitely can identify the second appellant because she had already seen his looks and body form.

[56] In the case of the first appellant, SP2 also had seen his face when he was pushing SP2 to go upstairs. Whilst in the room, SP2 could see the first appellant with the light that came from outside. The same also applied to the third appellant. SP2 could see him in the room with the light that came from outside.

[57] SP2 also identified the first, second and third appellants in the identification parade held by the Police.

[58] As for supporting evidence, the trial judge relied on the Police report lodged by SP2 (exh. P2) a few hours after the incident, in the early hours of 5 May 2004.

[59] The trial judge also relied on the evidence given by the medical doctor ("SP3") who examined SP2 on 5 May 2004 at about 7pm at the Pusat Perubatan Universiti Malaya (PPUM). The results of SP3's examination on SP2 (see Appeal Record pp. 549 and 550) show that SP2 had swelling and bruises below her right arm. SP2 had pain in her pubic area. SP3 found that there were several tears in SP2's hymen in her vagina, in the five, six, seven and nine o'clock positions. In several of the tears there was some bleeding. Just outside SP2's hymen were lacerations in the three, six and nine o'clock positions. SP2's vulva was swollen, and painful when touched. According to SP3, the tears happened in less than 24 hours, and such tears happened as a result of the penetration of a blunt and hard object such as a male organ.

[60] The evidence of SP3 was not challenged by the defence. It can be safely concluded that SP2 was raped, based on the findings of SP3.

[61] The trial judge also relied on the supportive evidence of SP4 who is the son of the tenant of the house where the incident took place. SP4 knew the three appellants before the incident. SP4 confirmed that the three appellants had come to his house on 4 May 2004. At first SP4 was not aware that there was a girl ie, SP2 who had come to his house. When SP4 went upstairs and entered the second room through the door of the bathroom, SP4 saw a girl, who was clothed, on the bed. SP4 also saw the three appellants in the room. SP4 prohibited the three appellants and the other male persons there to have any more sexual relations with SP2. SP4 saw SP2 crying and SP2 appealed to SP4 to send her back.

[62] SP4 also confirmed that SP2 was directed to bathe and cook Maggi mee for the male persons who were in the house. After that, SP4 took SP2 to the Puchong Police Station.

[63] The trial judge also relied on the evidence of SP5, the investigating officer, which is consistent with what SP4 had informed him. SP5 confirmed that SP2 was in a state of sadness and fear, and was very weak and tired.

[64] Based on the above, except for first charge in respect of first appellant, I am of the opinion that the trial judge did not err in fact or in law in holding that a *prima facie* case has been established by the prosecution against each of the three appellants on their respective charges.

Whether The Defence Has Raised Any Reasonable Doubts On The Prosecution's Case

[65] The three appellants opted to give their defence by way of unsworn statements from the dock.

[66] According to the trial judge, each of the three appellants denied that they had carnal intercourse against the order of nature by forcing SP2 to suck their male organs. The third appellant also denied that he had raped SP2.

[67] The trial judge held that since the three appellants gave unsworn evidence from the dock, and they could not be cross-examined, she found it difficult to give value to the evidence, and she gave very little weight to such evidence.

[68] The trial judge was of the opinion that the unsworn evidence of the three appellants was a mere denial and therefore the three appellants had failed to raise any reasonable doubt on the prosecution's case. Accordingly, the trial judge found the three appellants guilty on their respective charges and convicted and sentenced them.

[69] From a maximum evaluation of the totality of the evidence, except for the decision on the first appellant in respect of the first charge, I am convinced that the trial judge had not misdirected herself or had erred in fact and law regarding her decision on the respective cases against the three appellants.

[70] Learned counsel for the three appellants ("learned counsel") raised several issues in his written submissions to support the appeal. I will now consider these issues:

Inconsistencies In SP2's Evidence

(a) On the first day of hearing ie, 31 May 2005, in her examination-in-chief, SP2 stated that before she was raped by the first appellant, two other male persons entered the room and took off SP2's pants. However, on the next day, when questioned by the prosecution, SP2 stated that on the first day, she was mistaken. She corrected her evidence to say that when the first appellant was raping her, the other two male persons did not come in to be together with them.

To me, the evidence should therefore be the corrected version as given by SP2 on the second day of hearing. However, irrespective of whether the other two male persons were present or not, SP2 was definite in her evidence that the first appellant did rape her.

(b) Learned counsel submitted that the trial judge stated that the first appellant forced SP2 to lick his male organ after raping SP2 (see Appeal Record p. 538). SP2, however, had made a correction in her evidence and stated that, before being raped, the first appellant forced her to lick his male organ for 15 minutes.

To my mind, there is a clear difference between "after" and "before" in terms of time. However, in this case, irrespective of the discrepancy in time, SP2 was clear in her evidence that the first appellant did force her to lick his male organ. SP2

identified the first appellant in court as the person who not only raped her, but also forced her to suck his male organ, hit her and rubbed her.

(c) Learned counsel submitted that if what SP2 was alleging is true, then why was the first appellant not charged for rape.

In my opinion, only the prosecution can answer this question. The discretion to prosecute or not to prosecute is with the public prosecutor. Notwithstanding that, SP2's recorded evidence shows clearly that the first appellant did rape SP2 twice on that same occasion.

(d) Learned counsel submitted that if what SP2 alleged is true, then why the medical doctor, SP3, in her evidence did not state the effects of SP2 being beaten by the first appellant even though SP2 was examined within 24 hours from the incident.

I believe this is a question that only SP3 can answer. However, it must be borne in mind that the first appellant was charged for an offence under s. 377C of the Penal Code; but he was not charged for the offence of assault. Evidence of being beaten would be more material to a charge for assault. SP2 did not state whether she was beaten so badly that there were visible marks. So by the fact that SP3 did not find such marks on SP2, it can only be inferred that there were no such marks. The absence of such marks, or the lack of evidence by SP3 on such marks, does not mean that the first appellant did not commit the offence under s. 377C of the Penal Code.

(e) SP2 in her evidence stated that apart from raping her, the third appellant also sodomised her. Learned counsel questioned why the third appellant was not charged for sodomy if what SP2 alleged is true.

As I had stated earlier, the discretion whether to prosecute or not to prosecute lies with the public prosecutor. Learned counsel should have posed this question to the investigating officer when cross-examining him. Just because the third appellant was not charged for the offence of sodomy, it does not mean that SP2's evidence on the charges against the three appellants cannot be believed or accepted.

A **SP2's Evidence Is Not Credible**

[71] Learned counsel submitted that SP2 could narrate in great detail the whole incident in court even after one year. He then questioned why SP2 could not remember the two other persons
B who came, whether before she was raped by the first appellant, or when she was raped by the third appellant (see Appeal Record p. 113).

[72] The above can only be answered by SP2 but the lack of such evidence on the other two persons does not detract from
C SP2's evidence on the respective offences committed by the first and third appellants.

[73] Learned counsel also submitted that if SP2 could give such a detailed story which involved many suspects, why then, did the
D DNA report connect it to only 1 unknown male.

[74] Here, I am of the view that this can only be answered by the investigating officer and the DNA expert.

E **[75]** The above two submissions by learned counsel do show some inconsistencies in SP2's evidence but such inconsistencies are not material to the substantive issues regarding the charges or prove that SP2 is not a credible witness.

SP2's Evidence As Complainant Was Not Corroborated

F

[76] It is time, as submitted by learned counsel, that evidence on rape should be corroborated.

[77] In this case, it is unfortunate that SP2 was a victim of gang
G rape and it would be impossible to get eye witnesses to come forward to corroborate her evidence. Be that as it may, SP3's medical evidence confirmed evidence of rape on SP2. This, for the purposes of this case, is sufficient to support SP2's evidence.

SP2's Evidence Conflicts With Her Police Report

H

[78] The inconsistencies raised by learned counsel on this point in pp. 5 and 6 of his written submissions are not material except for one point ie, SP2 in court stated that a few people raped her. However, in her Police report, she stated only 1 person raped her.

I

[79] Learned counsel did not apply in the Sessions Court proceedings to impeach SP2's credit, so her evidence in court has to be accepted.

[80] What is material here is that the three appellants were charged under s. 377C of the Penal Code, but only the third appellant was charged for rape.

SP2's Evidence Conflicts With SP4's Evidence

[81] Learned counsel submitted that SP2 stated that the last suspect who was with her in the room was the third appellant before SP4 came in to take SP2 away; whereas SP4 stated that when he first entered the room there was a male person called Apek who was sitting on the bed with SP2. However, I note that SP4 did state that other than Apek, the three appellants were also initially there and then left the room when SP4 told them to stop having any more sexual relations with SP2.

[82] I do not think that SP2's evidence conflicts with SP4's evidence. SP4 confirmed that the third appellant was present; so was Apek. Later the third appellant left the room.

[83] Whether Apek was the last one present in the room with SP2 or otherwise does not detract from SP2's clear testimony that the third appellant raped her. SP2 did testify that there were several other male persons who also raped her ie, from the group of 12 who entered the room after the third appellant had raped her, but she could not identify them.

SP4's Evidence As An Accomplice Or An Accessory After The Fact

[84] Learned counsel submitted that SP4 was an accomplice to the three appellants and therefore his evidence could not be used to support SP2's evidence unless it was corroborated.

[85] I do not find any cogent evidence on record to prove that SP4 was an accomplice to the three appellants or an accessory after the fact. SP2 did state that when she first went into the house with the second appellant, she saw Rashid ie, SP4. However, there is no evidence that SP4 saw her at that point in time. The evidence showed that, out of the blue, SP4 walked into the room where SP2 later was. There was no other evidence to prove that SP4 was committing the same offences as the three appellants or abetting them in the committing of such offences. There was only evidence that SP4 is the son of the tenant of the house. SP4's parents were away and not at home at that time.

There was no evidence on any role of SP4 as an accomplice or accessory after the fact. Therefore, I am of the opinion that SP4 is a competent witness and his evidence can be accepted to support SP2's evidence.

Defective Identification Parade ("IP")

[86] In pp. 12 to 17 of learned counsel's submissions, he pointed out the defects of the IP and urged that the guidelines for holding an IP as laid down by VT Singham J in *PP v. Ayyavoo Subramaniam & Anor* [2004] 1 LNS 141 be followed.

[87] The guidelines in *Ayyavoo* are good and should be followed as closely as possible each time an IP is conducted.

[88] In this case, however, it is clear from the evidence adduced that SP2 could easily identify each of the three appellants. Even SP4 confirmed the identity of the three appellants. There is no good reason why such positive identification by SP2, and supported by SP4's evidence, should be rejected by the court.

The DNA report (Exh. P19 (A-I)) Did Not Connect It To The Three Appellants

[89] It is true, as submitted by learned counsel that the DNA report did not connect it to the three appellants. It is only connected to an "Unknown male 1".

[90] There is no evidence on why only certain samples were sent for DNA testing and why SP2's saliva was not sent for such testing.

[91] Investigations regarding this case should be most meticulous to ensure that every possible specimen found at the place of the incident be sent for DNA testing. Unfortunately, there is no evidence on this.

[92] However, the failure of the prosecution to produce more evidence of DNA testing on more relevant specimens does not mean that the evidence of the prosecution witnesses, in particular SP2, SP4 and SP3 should be rejected by the court. There is still no law to require that rape cases can only be proved by DNA tests and reports. As such, for the purpose of this case, the court can still, and will accept, the existing evidence adduced by the prosecution.

[93] Just because the DNA report was not connected to the three appellants, it does not mean that they did not commit the offences in their respective charges. There can be many reasons why the DNA report was not linked to the three appellants eg, there could be no seminal fluid stains of the three appellants found at the place of the incident to be taken for DNA testing if such fluids were not discharged by the three appellants at the time when the offences were committed. SP2 could not confirm whether any of the three appellants had let out their seminal fluids. She did state that when the first appellant inserted his male organ in her mouth she felt a salty taste. She did not state that she spat it out. She further stated that she spat out her saliva on to the second appellant's trousers but she was not sure whether he had discharged his seminal fluids at the time of the commission of the offence. In this case, as submitted by learned counsel, there were three patches of seminal fluids which were found and sent for DNA tests. The DNA report confirmed that they belonged to an "Unknown male 1". It is any one's guess whether that unknown male is Apek ie, the last male person found sitting on the same bed as SP2, when SP2 was lying down on the bed. That unknown male could also be any other male person. As SP3, the doctor, had testified, even if SP2 was raped by several persons, from the medical point of view, one cannot confirm which person raped her. If none of the three appellants let out their seminal fluids, then there would be no samples of theirs to be taken for DNA tests.

[94] Finally, I would like to caution that despite the complexity of the written submissions filed by learned counsel for the three appellants, and raising several issues of inconsistencies which I find not sufficiently material to nullify the evidence of the prosecution witnesses, the bottom line that all parties must be reminded is that such issues raised in the written submissions cannot detract from the true position that the three appellants' defence was made by way of unsworn statements from the dock, and was not subject to challenge or cross-examination by the prosecution.

[95] The law regarding the status of unsworn statements given by an accused person from the dock is as follows:

[96] Section 173 (ha) of the Criminal Procedure Code, Act 593 ("the CPC") provides for the accused person to be given three options to enter on his defence, one of which options is to give

A an unsworn statement from the dock. However, the CPC does not provide for the weight to be given by the court for an unsworn statement from the dock. We therefore have to rely on case law. The cases available regarding this issue are only High Court cases.

B **[97]** In *Public Prosecutor v. Shariff Kadir* [1997] 5 CLJ 463, Hishamuddin Yunus J. stated as follows:

> If the position is that the accused's unsworn statement from the dock is not evidence, the next basic and pertinent question that follows is: what weight should be attached to such a statement?
C This is another difficult issue, but one thing is clear though: *since, as a matter of law, an accused cannot be cross-examined on his unsworn statement made from the dock, such a statement cannot carry the same weight as evidence given in the witness-box under oath*. In *Mohamed Salleh* the trial Judge directed the jury to give the unsworn
D statement of the accused "such weight as the jury think fit" and this direction was upheld by the Federal Court as proper ...
>
> Applying this principle to the case of **a trial by a judge sitting alone (*ie* without a jury), like in the present case, the weight that should be given to such a statement must be such weight**
E **as the Judge thinks fit**. (emphasis added).

[98] In *Masroni Ahmad Rafi v. Public Prosecutor* [1996] 1 LNS 341, Jeffrey Tan J stated as follows:

> The Appellant gave a statement from the dock. The right of an
F accused ... to make an unsworn statement from the dock is not a procedural right but a substantive right: *Mohammed Salleh v. PP* [1969] 1 MLJ 104 @ 105 per Wee Chong Jin CJ; see also *Udayar Alagan & Ors v. PP* [1962] 28 MLJ 39. An accused who makes a statement from the dock should not be questioned by
G the trial judge except for the purpose of clearing up ambiguities (*Suhaime bin Haji Serat v. Req* [1956] 22 MLJ 252). *However, the weight to be given to a statement from the dock, since such a statement is not sworn evidence and would not have been tested by cross-examination, must be less than it being evidence from the witness box (see Mohamed Salleh v. PP [1969] 1 MLJ 104 @ 105]."…. it is not*
H *entitled to the same [10] weight as sworn testimony": PP v. Karim bin Othman [1994] 2 CLJ 826 @ 836 per Lamin J.* (as he then was); see also *Shimmin*'s Case 15 Cox C.C. 122 @ 124. As to the particular evidential value to be given to an unsworn statement from the dock, "much depends on the particular circumstances of
I each case": *Director of Public Prosecutions v. Walker* [1974] 1 WLR per Lord Salmon. And in *PP v. Lee Ah Ha* [1989] 1 MLJ 120,

where the prosecution had made out a case, Abdul Malek J. (as he then was) held that **a mere denial through a statement from the dock had not raised any doubt on the prosecution case.** (emphasis added).

[99] In *Public Prosecutor v. Mohd. Amin Mohd Razali & Ors* [2002] 5 CLJ 281, Zulkefli J stated as follows:

The position in law is that the right of an accused person to make an unsworn statement from the dock is a (*455) substantive right. However, we must bear in mind that statement from the dock is not sworn evidence which can be the subject of cross examination. Not so much weight can be given to what the accused said in the dock when compared to what the accused would give under sworn evidence. This is so because when a man gives evidence one can cross examine him and test his evidence and generally have a better opportunity of assessing him. Nevertheless, the law is very clear that the court cannot outright reject such evidence. The court must consider it and give it such weight for what it is worth and think fit having regard to the evidence adduced as a whole before the court. See the cases of *PP v. Sanassi* [1970] 2 MLJ 198 and *Mohamed Salleh v. PP* [1969] 1 MLJ 104.

[100] *Masron Ahmad (supra)* is a 1996 case and *Mohd. Amin Mohd. Razali (supra)* is a 2002 case. Both these cases cited *Muhammad Salleh v. PP* [1969] 1 MLJ 106 which is a 1969 case to hold that the right of an accused person to give an unsworn statement from the dock is a substantive right. However, s. 173(ha) of the CPC was introduced by way of an amendment ie, Act A 1274, which come into force on 7 September 2007. With the amendment, the right of an accused person to make an unsworn statement from the dock is now a procedural right.

[101] In, *PP v. Mohd. Abbas Danus Baksan* [2004] 7 CLJ 249, KP Gengadharan Nair, JC, stated as follows:

It is, in my humble view, quite clear that the accused was merely trying to tailor his defence in an attempt to create doubts about the prosecution's case knowing full well, having opted to give his evidence in the form of an unsworn statement from the dock that his story cannot be tested by cross examination. The end result of his statement is just a mere denial and assertions not supported by evidence. It is trite that mere denial without other proof to reasonably dislodge the evidence presented by the prosecution is insufficient to inject reasonable doubt into the prosecutions' case (see *PP v. Ling Tee Huah* [1980] 1 LNS 212).

[102] From the above, it is clear that an accused person has a procedural right to opt to give his evidence for his defence by way of an unsworn statement from the dock. However, the accused person would not be subject to cross-examination for such statement made. Therefore, such unsworn statement has to be evaluated by the trial judge and given the weight as the trial judge thinks fit, but the weight accorded cannot be as much as the weight that a trial judge would give to a sworn statement given by an accused person from the witness box.

[103] In the instant cases, the trial judge held that it was difficult to give value to the unsworn statements given by the three appellants from the dock, and she finally decided that she could only give very little weight to such evidence.

[104] I am of the opinion that the unsworn statements from the dock of the three appellants given for their defence do not have much weight, as correctly decided by the trial judge. The trial judge also held that the defence of the three appellants is a mere denial and, therefore, there was no reasonable doubt raised by the defence to rebut the prosecution's case.

[105] The conviction of the three appellants by the trial judge on their respective charges is confirmed and maintained.

[106] Regarding the sentence imposed by the trial judge on each of the three appellants, I am of the view that such sentence is fair and appropriate, and commensurates with the offence committed. It is not manifestly excessive that it warrants an intervention by this court. The sentence should be seen in the light of the background facts as enumerated earlier. The three appellants preyed upon a young innocent girl, who followed the second appellant to the house based on trust and friendship, and abused her body for their own selfish gratification, without regard to morality or conscience, or the fear of God. Such repulsive crimes should be punished in the most deterrent manner to prevent future cases of random gang rape and sexual abuse upon the young girls of our society. Even though the prosecution had not filed a cross appeal on sentence, had it not been for the young age of the three appellants, I am of the strong view that the sentence of imprisonment should be enhanced, considering the severe maximum punishment provided for the respective offences in the Penal Code.

[107] Be that as it may, the sentence imposed on each of the three appellants is confirmed.

[108] The appeal of the three appellants is dismissed.

[109] Learned counsel for the three appellants applied for stay of execution of the sentence pending an appeal to be made to the Court of Appeal. The prosecution did not object to bail being offered, provided that the original amounts of bail of RM14,000 for each of the first and third appellants and RM10,000 for the second appellant be now increased, considering that the decision of the trial judge has been affirmed by this court. The learned DPP informed the court that in the lower court, the prosecution had actually objected to bail. However, bail was granted.

[110] I granted stay of execution of the sentence pending the outcome of the appeal. A cash bail of RM20,000 in one surety was granted to each of the three appellants.